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Obstructing Justice:
The Federal Government's Disuse of Deferred Prosecution Agreements for Non-Corporate Defendants

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Obstructing Justice:
The Federal Government's Disuse of Deferred Prosecution Agreements for Non-Corporate Defendants

by

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Dedication

This Report is dedicated to my father, who set my feet on every path they have had the opportunity to walk.

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I would like to express my deepest gratitude to Professor Todd Lochner, who cultivated my interest in political science and the law and ensured I found a way to combine the two; to Professor Graham Strong, who sparked my interest in criminal law; to Professors Cary Franklin and Jordan Steiker, whose emphasis on equality shaped my studies and refocused my purpose; and to Professors Susan Klein and Peter Ward, who were integral to the success of this project.

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Abstract

Obstructing Justice:
The Federal Government's Disuse of Deferred Prosecution Agreements for Non-Corporate Defendants

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Deferred prosecution agreements (DPAs) are voluntary agreements between prosecutors and defendants in which the government agrees to suspend prosecution for a specified period of time while the defendant is monitored for compliance with certain conditions. Though Congress modeled the legislation authorizing federal use of DPAs on pretrial diversion programs targeting nonviolent, nonrecidivist drug offenders, the Department of Justice today uses DPAs almost exclusively for resolving corporate criminal liability. Given the federal government's emphasis on remedying mass incarceration and the collateral consequences of criminal convictions, expanding the federal use of DPAs to the class of offenders and offenses for which such agreements were intended represents an unexplored opportunity for achieving meaningful criminal justice reform.

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INTRODUCTION

> *The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done*.[1]

U.S. prosecutors, observers have noted, are "arguably the most powerful officials in the U.S. criminal justice system."[2] The federal government provides prosecutors immense leeway in deciding which offenders to charge, what offenses to charge those individuals with, and how to approach plea bargaining and the dismissal of charges.[3] In a system in which prosecutors are the "real lawmakers," changing prosecutors' behavior is essential to reducing incarceration rates and racial disparities in sentencing.[4] While many vehicles for prosecutorial discretion are bound up in statutory regimes subject to political logjam, several non-legislative avenues remain open. Among those is the use of deferred prosecution agreements (DPAs) for noncorporate individual defendants.

Pursuant to Department of Justice policy, DPAs are used almost exclusively for major corporate defendants engaged in white-collar criminal activity—despite being available to U.S. Attorneys in a wide variety of circumstances. That practice, in addition

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1 Berger v. United States, 295 U.S. 78, 88 (1935) (quoted in United States v. Saena Tech Corp., 2015 WL 6406266, at *1 (D.D.C. Oct. 21, 2015)).

2 MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 266 (2015).

3 *Id*. *See generally* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR (2007).

4 *Id*. at 266–67; William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506 (2001).

to being inconsistent with the historical development and theoretical underpinnings of DPAs, is at odds with Congress's intent in authorizing such agreements in federal law enforcement.

This Report analyzes the history of deferred prosecution agreements, tracking their incorporation into the federal criminal justice system and subsequent use in cases involving corporate and noncorporate criminal defendants. It adds to the existing literature by assessing the Department of Justice's use of DPAs in light of the legislative history of the agreements' authorizing legislation and the theoretical support for pretrial diversion programs in general. Finally, after reviewing recent literature regarding the role federal drug charges play in mass incarceration and the concomitant collateral consequences of conviction, this Report discusses the merits of expanding the use of DPAs to nonviolent individual criminal offenders as a means to achieve the federal government's stated goals for criminal justice reform.

CHAPTER 1: BACKGROUND AND HISTORY

Understanding the issues associated with the Department of Justice's approach to deferred prosecution agreements requires an understanding of the history of DPAs, both in general and within the federal government. This chapter summarizes that history, explaining both the characteristics of DPAs and their development in the United States.

Deferred Prosecution Agreements Explained

Deferred prosecution agreements (DPAs) are voluntary agreements between prosecutors and defendants in which the government agrees to suspend prosecution for a specified period of time while the defendant is monitored for compliance with certain conditions.[5] If the defendant successfully complies with those conditions, the government does not prosecute; if he does not comply, the government does.[6] Defendants who successfully comply with a DPA do not enter a guilty plea and are thus not "tarred" with a criminal conviction.[7] Offenders whose indictments are dismissed pursuant to a successful deferral are not felons, and, should the individual in question exhibit recidivist

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5 *Saena Tech Corp.*, 2015 WL 6406266, at *1; Jeffrey B. Coopersmith & Ashley L. Vulin, *If You Give a Judge a Case: Judicial Oversight of Deferred Prosecution Agreements*, CHAMPION, Jan./Feb. 2016, at 36, 36–37.

6 *Saena Tech Corp.*, 2015 WL 6406266, at *1; Coopersmith & Vulin, *supra* note 5, at 36–37. Defendants are typically required to admit to the alleged criminal conduct in a criminal information filed at the same time as the DPA, allowing a prosecutor to insist on a guilty plea if the defendant subsequently fails to comply with the requirements of the DPA. Coopersmith & Vulin, *supra* note 5, at 36–37.

7 Coopersmith & Vulin, *supra* note 5, at 37.

behavior, deferrals are not considered evidence of prior criminal conduct for sentencing purposes in later prosecutions.[8]

In the context of corporate criminal cases, the Department of Justice has noted that these agreements "occupy an important middle ground between declining prosecution and obtaining the conviction."[9] In the federal criminal justice system, whether a DPA is offered to a particular defendant depends entirely on the discretion of the Department of Justice and its attorneys.[10]

Though often addressed in tandem, DPAs are distinct from nonprosecution agreements (NPAs). DPAs are formally filed with the court by the Department of Justice, whereas NPAs are more akin to private contracts between prosecutors and alleged offenders—they are not filed with the court and are thus not subject to judicial review.[11]

The Historical Development of DPAs in the United States

The first known use of deferred prosecution agreements in the United States dates to 1914, when the Chicago Boys' Court developed DPAs as a way to resolve juvenile

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8 U.S. SENTENCING COMM'N, GUIDELINES MANUAL, §4A1.2(f) (2015).

9 U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-28.200, https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations#9-28.200 [hereinafter U.S. ATTORNEYS' MANUAL].

10 This Report exclusively addresses the federal government's use of DPAs. The structure and availability of these agreements varies widely between states.

11 Memorandum from Craig S. Morford, Acting Deputy Att'y Gen., to Heads of Dep't Components and U.S. Attorneys 1 n.2 (Mar. 7, 2008), http://www.justice.gov/sites/default/files/dag/legacy/2008/03/20/morford- useofmonitorsmemo-03072008.pdf.

crime without "branding" offenders as criminal.[12] The Judicial Conference formally acknowledged the use of such agreements in 1947, emphasizing that "in many cases, offenders are capable of correction without prosecution" and that DPAs protected offenders from "stigmatiz[ation] by a court record of any kind."[13] The use of DPAs expanded beyond juvenile offenders in the 1960s, largely due to the Supreme Court's 1962 decision in *Robinson v. California*.[14] In holding that punishing an individual for a "status offense," including drug addiction, was cruel and unusual punishment in violation of the Eighth and Fourteenth Amendment, the Court opened the door to government-run compulsory treatment programs.[15]

DPAs were incorporated into the federal system in the 1970s. Near the end of Lyndon B. Johnson's presidency, the Department of Justice developed a bill known as the "Crime Reduction Act."[16] Though the Department did not formally share the bill with the congressional branch, a version of the proposed legislation was made its way to U.S. Representative Abner J. Mikva.[17] Representative Mikva subsequently used the proposed "Crime Reduction Act" as the basis for two bills; he introduced both in

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12 JAMES A. INCIARDI ET AL., DRUG CONTROL AND THE COURTS 25 (1996); Benjamin M. Greenblum, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863,1866 (2005).

13 JUD. CONF. OF THE U.S., REPORT OF THE COMMITTEE ON PROBATION WITH SPECIAL REFERENCE TO JUVENILE DELINQUENCY (Aug. 21, 1947).

14 Robertson v. California, 370 U.S. 660 (1962); *Developments in the Law: Alternatives to Incarceration*, 111 HARV. L. REV. 1863, 1902–03 (1998).

15 *Robertson*, 370 U.S. at 665–66; *Developments in the Law*, *supra* note 14, at 1903.

16 ANTHONY PARTRIDGE, FED. JUDICIAL CTR., LEGISLATIVE HISTORY OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974, at 12 (1980).

17 *Id*.

November 1969.[18] Of those, the "Pretrial Crime Reduction Act" addressed the need for speedy trials and included an exclusion analogous to what would become § 3161(h)(2).[19]

Although Representative Mikva's proposed legislation was unsuccessful, it was followed by speedy trial legislation introduced by Senator Sam J. Ervin, Jr. in June 1970.[20] That legislation contained three titles, the first of which established time limits for criminal trials.[21] Though the first iteration of the bill was unsuccessful, it was introduced again in February 1971.[22] Following hearings held by the Senate Subcommittee on Constitutional Rights, the bill was reported to the full Senate Judiciary Committee, where it died.[23] In 1973, the subcommittee bill was reintroduced by Senator

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18 *Id*.

19 *Id*.; *see also* United States v. Saena Tech Corp., 2015 WL 6406266, at *10 (D.D.C. Oct. 21, 2015). Representative Mikva's introduction of the Pretrial Crime Reduction Act coincided with the Nixon administration's embrace of "preventative detention" as a means to control crime by defendants on pretrial release. PARTRIDGE, *supra* note 16, at 13; *see also* ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 157 (2016) (noting that preventive detention, which involved detaining suspects without bail for up to two months, was meant to "ensure that accused criminals were behind bars and thus unable to possibly commit crime"). Representative Mikva viewed speedy trial guarantees as an alternate, better solution that "avoid[ed] the repugnant, and probably unconstitutional, alternative of preventive detention." 115 CONG. REC. 34,335 (1969); PARTRIDGE, *supra* note 16, at 13.

20 PARTRIDGE, *supra* note 16, at 13. Senator Ervin did not characterize his bill as a revision of Representative Mikva's, but observers considered the "common heritage" of the bills "unmistakable." *Id*. at 14.

21 *Id*. at 14.

22 *Id*. at 15.

23 *Id*.

Ervin; that version was reported to the full committee in spring 1974.[24] The Judiciary Committee reported an amended version of the bill to the Senate.[25]

The Senate-passed bill was considered in the House of Representatives by the Judiciary Committee's Subcommittee on Crime, which made several amendments.[26] Those amendments were joined by further changes added by the full Judiciary Committee, which reported the bill to the House on December 20, 1974.[27] Several amendments were made on the House floor, but the bill was passed and transmitted to the Senate.[28] Following efforts to resolve differences between the House and Senate versions of the legislation, the bill was signed into law by President Gerald Ford on January 3, 1975.[29]

Today, federal prosecutors are authorized to use DPAs pursuant to the same language adopted in 1975: the provision of the Speedy Trial Act that excludes from the speedy trial calculation "[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct."[30] This provision allows prosecutors to file a criminal information,

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24 *Id*.
25 *Id*.
26 *Id*.
27 *Id*.
28 *Id*. at 15–16.
29 Gerald R. Ford, *Statement on Signing the Speedy Trial Act of 1974*, AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/index.php?pid=5404.
30 28 U.S.C. § 316(h)(2) (2010). The Speedy Trial Act "establishes time limits for completing the various stages of a federal criminal prosecution" and, to protect against

"thereby obtaining the benefit of the pending criminal charge and potential court supervision of the defendant," without immediately proceeding to trial.[31]

Congress's Intent in Authorizing Federal Prosecutors' Use of DPAs

The Speedy Trial Act's legislative history makes clear that DPAs were "originally intended to give prosecutors the ability to defer prosecution of individuals charged with certain non-violent criminal offenses to encourage rehabilitation."[32] Indeed, a review of the Act's history "shows just how far the use of Section 3161(h)(2) to defer the prosecution of corporations departs from what Congress intended" when it first authorized deferred prosecution agreements in the federal context.[33]

LEGISLATIVE HISTORY

As noted above, both Representative Mikva's proposed legislation and the bill introduced by Senator Ervin included speedy trial exclusions for any "period of delay during which prosecution is deferred by the U.S. Attorney pursuant to written agreement

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rushing defendants to trial without adequate time to prepare, provides a minimum time period during which trial may not commence. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL, CRIMINAL RESOURCE MANUAL 628(A), https://www.justice.gov/usam/criminal-resource-manual-628-speedy-trial-act-1974 [hereinafter CRIMINAL RESOURCE MANUAL].

31 United States v. Saena Tech Corp., 2015 WL 6406266, at *10 (D.D.C. Oct. 21, 2015); *see also* CRIMINAL RESOURCE MANUAL, *supra* note 30, at 628(A) (explaining the Act's requirement that a trial commence within seventy days from either (1) the date the information or indictment was filed or (2) the date the defendant appears before an officer of the court in which the charge is pending, whichever is later); *see also* 18 U.S.C. § 3161(c)(1) (2010).

32 *Saena Tech Corp.*, 2015 WL 6406266, at *10.

33 *Id.* at *21.

with the defendant for the purpose of allowing the defendant to demonstrate his good conduct."[34] This language is virtually identical to that found in § 3161(h)(2).[35] The legislative history of the Act makes clear that the deferred prosecution exclusion was specifically designed to allow for "the deferral of prosecution on the condition of good behavior," especially in cases involving first-time noncorporate criminal defendants.[36] The provision was "intended to encourage practices that had been ongoing in certain courts," as made clear by the fact that the committee report accompanying the bill explicitly linked § 3161(h)(2) to pretrial diversion programs in Washington, D.C. and New York City.[37] Those programs, known as Project Crossroads and the Manhattan Court Employment Project, respectively, were deemed "quite successful" by the authors of the committee report.[38]

PROJECT CROSSROADS

Project Crossroads was an initiative focused on providing pretrial intervention alternatives for "youthful first-time offenders."[39] Created in 1967, the project involved a

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34 PARTRIDGE, *supra* note 16, at 281, 288. Excluding cross-references, the bills introduced by Representatives Mikva and Ervin were identical. *Id*. at 5.

35 The final version of the legislation included a requirement that the agreement be reached "with the approval of the court." 28 U.S.C. § 316(h)(2) (2010). While much has been made of that addition, see, for example, Coopersmith & Vulin, *supra* note 5, at 36, judicial oversight of deferred prosecution agreements is outside the scope of this Report.

36 S. REP. NO. 93-1021, at 37, *reprinted in* PARTRIDGE, *supra* note 16, at 117.

37 *Id*.

38 *Id*.

39 United States v. Saena Tech Corp., 2015 WL 6406266, at *21 (D.D.C. Oct. 21, 2015); ROBERTA ROVNER–PIECZENIK, NAT'L COMM. FOR CHILDREN & YOUTH, U.S. DEP'T OF

ninety-day program of counseling, job placement, job training, and remedial education.[40] Participants who successfully completed the program were rewarded with *nol–pros*, or the discontinuation of their prosecution.[41] In addition to the reduction of costs associated with prosecution, detention, trial, and incarceration, the program was meant to "alter[] the image of the courts in the eyes of the accused and the community," allowing the criminal justice system to "be viewed as an institution interested in the individual and oriented toward the treatment approach to crime prevention."[42] By allowing participants "an avenue through which to gain a foothold in the legitimate opportunity structure of society," the program hoped to mitigate the negative byproducts of criminal convictions and benefit the community at large.[43]

MANHATTAN COURT EMPLOYMENT PROJECT

The Manhattan Court Employment Project, meanwhile, was an "experimental, alternative disposition" program originally sponsored by the Vera Institute of Justice and funded by the Department of Labor that began operations in 1967.[44] Based on the idea that "prolonged exposure to the criminal justice system is detrimental to the rehabilitation

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HEALTH, EDUC. & WELFARE, PROJECT CROSSROADS AS PRE-TRIAL INTERVENTION: A PROGRAM EVALUATION 1 (1970).

40 ROVNER–PIECZENIK, *supra* note 39, at 1.

41 *Id*. at 2.

42 *Id*.

43 *Id*.

44 *Saena Tech Corp*., 2015 WL 6406266, at *22; John P. Richert, *The Court Employment Project in New York*, 61 AM. BAR ASS'N J. 191, 191 (1975).

of the offender,"[45] the program was designed to create alternatives to prison or probation for juvenile offenders.[46]

At its inception, participation in the program was limited to offenders age sixteen through forty-five who (1) were unemployed or underemployed, (2) were residents of New York City with a verifiable address, (3) were not charged with a mere "violation" or "minor offense," (4) were not charged with homicide, rape, kidnapping, or arson, (5) were not drug addicts or alcoholics, though individuals charged with possession of narcotics were considered, and who (6) did not have a prison record of more than one year.[47] The program, working alongside the District Attorney's office, engaged with defendants immediately after their arrest, providing support and training for ninety days.[48] If the defendant cooperated with and successfully completed the program, the Project recommended to the prosecutor that charges be dismissed.[49] By the Project's third year in operation, over 61% of participants successfully participated in the program, earning dismissals of all charges.[50] The program later transitioned to CASES, a multifaceted organization with operations in Manhattan, Brooklyn, the Bronx, and

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45 Richert, *supra* note 44, at 191.

46 *Programs: Court Employment Project*, CASES, http://www.cases.org/programs/youth/cep.php.

47 Richert, *supra* note 44, at 192.

48 VERA INST. OF JUSTICE, THE MANHATTAN COURT EMPLOYMENT PROJECT OF THE VERA INSTITUTE FOR JUSTICE: FINAL REPORT 1967–1970 at 2 (1970), http://www.vera.org/sites/default/files/resources/downloads/the-manhattan-court-employment-project.pdf

49 *Id*.

50 *Id*. at 39.

Queens,[51] where it exists today as an alternative-to-incarceration program for individuals aged sixteen through twenty-four facing felony charges.[52]

51 Richert, *supra* note 44, at 191.

52 *Programs: Court Employment Project*, CASES, http://www.cases.org/programs/youth/cep.php.

CHAPTER 2: THE CURRENT USE OF DPAS BY FEDERAL PROSECUTORS

Today, the vast majority of DPAs entered into by federal prosecutors are used to resolve criminal investigations into corporate wrongdoing, particularly in the financial sector. This is true despite the fact that the Department of Justice's (DOJ's) existing standards governing the use of DPAs permits U.S. Attorneys to use the agreements with certain noncorporate individual criminal defendants. This Chapter summarizes those standards and examines the DOJ's use of DPAs in two distinct populations: noncorporate and corporate defendants.

Existing DOJ Standards Governing the Use of DPAs

The Department of Justice first promulgated federal standards for deferred prosecution agreements in 1997, when it incorporated the mechanism into its manual for U.S. Attorneys throughout the country.[53] In doing so, the Department identified three purposes served by the use of DPAs: preventing future criminal activity among certain offenders, saving prosecutive and judicial resources for concentration on major cases, and providing a vehicle for community- and victim-centered restitution.[54]

Today, federal prosecutors may—at their discretion—reach DPAs and other pretrial diversion agreements with offenders who (1) do not have two or more prior

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53 Greenblum, *supra* note 12, at 1867; DEP'T OF JUSTICE, U.S. ATT'YS MANUAL § 9-22.010 (1997).

54 U.S. ATTORNEYS' MANUAL, *supra* note 9, at § 9-22.010.

felony convictions, (2) are not public officials or former public officials accused of an offense arising out of an alleged violation of a public trust, and (3) are not accused of an offense related to national security of foreign affairs.[55] Supervision pursuant to a DPA is generally limited to eighteen months[56] and may include employment, counseling, education, job training, psychiatric care, or other forms of restitution or community service.[57]

The Department of Justice's guidelines for the use of DPAs "reflect the prevailing view that eligibility for diversion should be limited to certain categories of offenders and offenses."[58] U.S. Attorneys are not authorized to divert individuals who have two or more prior felony convictions, in keeping with the general approach that DPAs are most appropriate for individuals with minimal criminal histories,[59] and the Department's emphasis on saving resources for "concentration on major cases" implies that such diversion should not be used in cases involving major, violent crimes.[60]

Comparing DPA Usage for Corporate and Noncorporate Defendants

Despite Congress's intent in authorizing deferred prosecution agreements and the Department of Justice's own provisions guiding their use, federal prosecutors rarely offer

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55 *Id*.
56 *Id*.
57 CRIMINAL RESOURCE MANUAL, *supra* note 30, at §§ 712(E)–(F).
58 David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1305 (2013).
59 *Id*.
60 *Id*.

deferred prosecution agreements to noncorporate criminal defendants.[61] According to Department of Justice statistics for fiscal year 2012, the most recent year for which data is available, pretrial diversions for individual defendants accounted for less than 1% of the reasons Assistant U.S. Attorneys declined to prosecute.[62] The comparative rarity of noncorporate individual DPA agreements has persisted for years: in 2002, only 1.5% percent of all federal cases not prosecuted were deferred.[63] The Department of Justice does not publish data regarding the use of DPAs for noncorporate individual criminal defendants, but existing data suggests that a maximum of 6.1% of all DPAs and NPAs entered into by the Department's Criminal Division could involve such agreements.[64]

The federal government has recently begun expanding its corporate criminal liability guidance to include officers and executives of targeted corporations. In September 2015, Deputy Attorney General Sally Quillian Yates issued a memorandum, known as the Yates Memo, stating that companies would only receive cooperation credit if they provided the Department "all relevant facts relating to the individuals responsible

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61 *Id*. at 1306; *see also* U.S. ATTORNEYS' MANUAL, *supra* note 9, at § 9-22.010.

62 *See* MARK MOTIVANS, DEP'T OF JUSTICE, BUREAU OF JUSTICE STATS., FEDERAL JUSTICE STATISTICS, 2012—STATISTICAL TABLES 2 tbl.2.3 (2015), at http://www.bjs.gov/content/pub/pdf/fjs12st.pdf; *see also* United States v. Saena Tech Corp., 2015 WL 6406266, at *25 (D.D.C. Oct. 21, 2015).

63 Greenblum, *supra* note 12, at 1866 (2005); *see also* U.S. SENTENCING COMM'N, COMPENDIUM OF FEDERAL JUSTICE STATISTICS 30–31 tbl.2.4 (2002).

64 U.S. GOV'T ACCOUNTABILITY OFF., CORPORATE CRIME: DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS 35 tbl. 3 (2009) (showing that of the forty-nine DPAs and NPAs entered into by the Department of Justice's criminal division, only three were not entered into by the fraud, asset forfeiture, Enron Task Force, Obscenity Prosecution Task Force, or public integrity sections) [hereinafter GAO REPORT ON CORPORATE CRIME].

for the misconduct."[65] Shortly thereafter, the Securities and Exchange Commission entered into a DPA with an individual, agreeing to defer Foreign Corrupt Practices Act charge against the individual for three years in recognition of his cooperation during the government's investigation into his employer's wrongdoing.[66] However, the Yates Memo and its resultant policy shift specifically target employees and officers of corporate wrongdoers. Despite the availability of DPAs for noncorporate criminal defendants, prosecutors' use of those agreements for such defendants remains so sporadic as to be considered a nullity.

DPAs and Corporate Criminal Defendants

Traditionally, federal efforts to resolve criminal charges against corporations were closely aligned with the three foundational options of the U.S. criminal justice system: decline prosecution, prosecute and engage in successful plea-bargaining, or prosecute and proceed to trial.[67] The DOJ's reliance on that triad continued through the end of the twentieth century, as evidenced by a 1999 memorandum by then-Deputy Attorney

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65 Memorandum from Sally Quillian Yates, Deputy Att'y Gen., on Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), https://www.justice.gov/dag/file/769036/download.

66 Lily Becker, "The Carrot and the Stick: The SEC's First Deferred Prosecution Agreement with an Individual in an FCPA Case," Orrick Sec. Litig., Investigations & Enforcement Blog, Feb. 22, 2016, http://blogs.orrick.com/securities-litigation/2016/02/22/the-carrot-and-the-stick-the-secs-first-deferred-prosecution-agreement-with-an-individual-in-an-fcpa-case/.

67 Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 Am. Crim. L. Rev. 537, 544 (2015); Mike Koehler, *Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement*, 49 U.C. Davis L. Rev. 497, 500 (2015);

General Eric Holder.[68] That document, which was titled *Bringing Criminal Charges Against Corporations* and which is now known as the Holder Memo, was intended to serve as a guide for prosecutors determining whether to charge a corporation with a violation of criminal law.[69] Though it provided eight factors for prosecutors to consider when making charging decisions involving corporations, the memorandum did not reference DPAs or NPAs.[70]

Less than one year later, the collapse of the Enron Corporation and associated investigation into accounting firm Arthur Andersen highlighted the need for a revised approach to corporate criminal liability.[71] The Department of Justice brought criminal charges against Arthur Andersen in 2002, leading to a jury trial and conviction for

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68 Alexander & Cohen, *supra* note 67, at 549; Koehler, *supra* note 67, at 500; Memorandum from Eric Holder, Deputy Att'y Gen., to All Component Heads and U.S. Attorneys on Bringing Criminal Charges Against Corporations (June 16, 1999), http://www.justice.gov/criminal/fraud/documents/reports/1999/charging- corps.pdf.

69 Lauren Giudice, Note, *Regulating Corruption: Analyzing Uncertainty in Foreign Corrupt Practices Act Enforcement*, 91 BOSTON U. L. REV. 347, 362 (2011).

70 Among the eight factors identified in the Holder Memo was the company in question's willingness to waive the attorney-client and work-product privileges. Peter Spivack & Sujit Raman, Essay, *Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements*, 2008 ANN. SURVEY WHITE COLLAR CRIME 159, 167. The defense bar and certain courts harshly criticized prosecutors' use of that factor, which was encouraged in subsequent Department memoranda. *Id*. at 167–69. In 2006, then-Deputy Attorney General Paul McNulty issued a memorandum that superseded the Thompson Memo and strictly limited efforts to secure the waivers described herein. *Id*. at 170.

71 *See* Koehler, *supra* note 67, at 501–02 (identifying the "Arthur Anderson effect" as a phenomenon in which "criminal charges alone, and certainly criminal convictions, [can] be the death sentence of a business organization").

obstruction of justice.[72] The company suffered myriad collateral consequences—including the loss of its certified public accounting license—as a result of the prosecution, causing it to functionally go out of business and impacting thousands of jobs, shareholders, and other actors.[73] All this occurred despite the Supreme Court's 2005 reversal of Arthur Andersen's criminal conviction.[74]

In response to the challenge of "aggressively root[ing] out corporate fraud while remaining sensitive to the considerable collateral consequences of moving criminally against an entire entity," then-Deputy Attorney General Larry D. Thompson published *Principles of Federal Prosecution of Business Organizations*, now known as the Thompson Memo.[75] That document, unlike the Holder Memo, provided that "pretrial diversion [could] be considered in the course of the government's investigation."[76] In doing so, the Thompson Memo "effectively open[ed] the door" to the federal government's use of deferred prosecution and nonprosecution agreements to resolve

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72 Jonathan Weil & Alexei Barrionuevo, "Arthur Andersen is Convicted on Obstruction-of-Justice Count," WALL STREET J. (June 16, 2002 11:28 AM), http://www.wsj.com/articles/SB1023469305374958120.

73 Giudice, *supra* note 69, at 363 (2011); James Titcomb, "Arthur Andersen Returns 12 Years After Enron Scandal," TELEGRAPH (Sept. 2, 2014 11:22 AM), http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/11069713/Arthur-Andersen-returns-12-years-after-Enron-scandal.html.

74 Arthur Andersen LLP v. United States, 544 U.S. 696 (2005).

75 Spivack & Raman, *supra* note 70, at 166.

76 Memorandum from Larry D. Thompson, Deputy Att'y Gen., to Heads of Department Components and U.S. Attorneys on Principles of Federal Prosecution of Business Organizations 6 (Jan. 20, 2003), http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf; *see also* Koehler, *supra* note 67, at 503.

corporate criminal liability, which had theretofore remained largely unexplored.[77] Response to the Thompson Memo was swift: following its promulgation, the federal government's use of DPAs and NPAs "exploded."[78]

The use of DPAs and NPAs to resolve federal corporate criminal investigations was "further entrenched" in 2008, when then-Deputy Attorney General Mark Filip promulgated revised principles for federal prosecution of business organizations that, for the first time, were incorporated into the Department of Justice's U.S. Attorney's Manual.[79] The Filip Memo addressed the use of NPAs and DPAs in detail, noting that such agreements were especially appropriate "where the collateral consequences of a corporate conviction for innocent third parties would be significant."[80]

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77 Scott A. Resnik & Keir N. Dougall, "The Rise of Deferred Prosecution Agreements," N.Y. L.J. (Dec. 18, 2006), https://kattenlaw.com/files/21834_The_Rise_of_Deferred_Prosecution_Agreements.pdf; *see also* Lawrence D. Finder & Ryan D. McConnell, *Devolution of Authority: The Department of Justice's Corporate Charging Policies*, 51 ST. LOUIS U. L.J. 1, 14 (2006) (explaining that there were no pre-trial agreements in 1999 and that only four were reached between the publication of the Holder and Thompson Memos); *see also* Koehler, *supra* note 67, at 503.

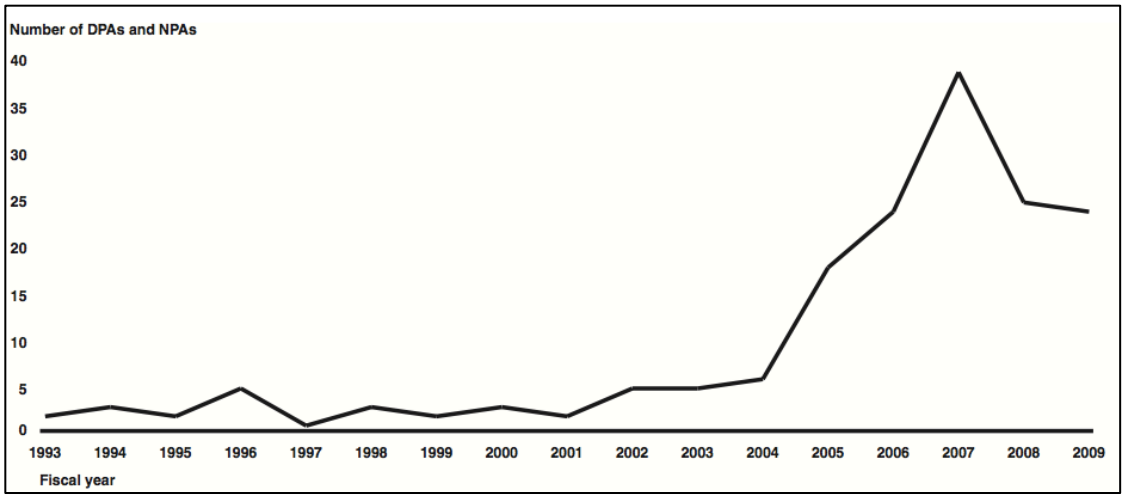
78 Finder & McConnell, *supra* note 77, at 15–17 (characterizing the Thompson Memo as a "clear mandate that pre-trial diversion was an efficient and proper way to reward corporate defendants who agreed to cooperate in certain circumstances); *see also* Spivack & Raman, *supra* note 70, at 166–67 ("[T]he number of executed DPAs and NPAs has burgeoned since the publication of the Thompson Memo.").

79 Koehler, *supra* note 67, at 507; Memorandum from Mark Filip, Deputy Att'y Gen., to Heads of Department Components and U.S. Attorneys on Principles of Federal Prosecution of Business Organizations 1 (Aug. 28, 2008), https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf [hereinafter Filip Memo].

80 Filip Memo, *supra* note 79, at 18.

Today, the federal government's use of corporate deferred prosecution and nonprosecution agreements is widespread.[81] As of January 2015, federal prosecutors had entered into a total of 308 DPAs with companies since 2000.[82] More than half of those agreements were entered into after 2009,[83] and the Department of Justice and Securities and Exchange Commission entered into 100 corporate NDAs and DPAs in 2015 alone.[84]

Figure 1: Annual Number of Corporate DPAs and NPAs (1993–2009)[85]



81 *See* Alexander & Cohen, *supra* note 67, at 562 (summarizing the authors' effort to identify and catalog all NPAs, DPAs and plea agreements entered into by public corporations between 1997 and 2011 and noting that, of the 486 agreements identified, 157 were NPAs or DPAs).

82 Gordon Bourjaily, *DPA DOA: How and Why Congress Should Bar the Use of Deferred and Non-Prosecution Agreements in Corporate Criminal Prosecutions*, 52 HARV. J. LEGIS. 543, 546–47 (2015).

83 *Id*.

84 GIBSON DUNN, YEAR-END UPDATE ON CORPORATE NON-PROSECUTION AGREEMENTS (NPAS) AND DEFERRED PROSECUTION AGREEMENTS (DPAS) 1 (2016), http://www.gibsondunn.com/publications/Pages/2015-Year-End-Update-Corporate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.aspx.

85 GAO REPORT ON CORPORATE CRIME, *supra* note 64, at 14 fig.2.

CHAPTER 3: THE NEED FOR FEDERAL CRIMINAL JUSTICE REFORM

In recent years, public discourse has begun to emphasize the characteristics and failings of the criminal justice system, particularly with respect to overincarceration and the debilitating collateral consequences of criminal convictions. Such discussion has been seen at the highest levels of the federal government. President Barack Obama has said that "[m]ass incarceration makes our country worse off," acknowledging that the United States has "locked up more and more nonviolent drug offenders than ever before" and that "[i]n far too many cases, the punishment simply does not fit the crime."[86] Former Attorney General Eric Holder, prior to his departure, noted that "our system has perpetuated a destructive cycle of poverty, criminality, and incarceration that has trapped countless people and weakened entire communities—particularly communities of color."[87]

This Chapter explores the themes identified above, explaining both (1) the issues of mass incarceration, the rising cost of operating the federal prison system, and the collateral consequences of criminal convictions, and (2) the racial contours associated with each of those phenomena.

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86 President Barack Obama, Remarks by the President at the NAACP Conference (July 14, 2015), https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference.

87 Eric Holder, Att'y Gen., One Year After Launching Key Sentencing Reforms, Attorney General Holder Announces First Drop in Federal Prison Population in More Than Three Decades (Sept. 23, 2014), http://www.justice.gov/opa/pr/one–year–after–launching–key–setencing–reforms–attorney–general–holder–annouces–first–drop–0.

Mass Incarceration

As of October 2015, the incarceration rate in America was the second highest in the world.[88] Despite representing only 4.4% of the world's population, the United States houses more than 20% of the world's prisoners.[89] This phenomenon is largely a recent development: between 1980 and 2000, the number of incarcerated persons in America grew from approximately 300,000 to over two million.[90] These numbers, when combined with data showing that black men have the highest imprisonment rate in every age group,[91] have led scholars to condemn the U.S. criminal justice apparatus as a caste system analogous to racial segregation in the post-Reconstruction South.[92]

Violent crime is not responsible for this phenomenon, even when the analysis is limited to those convicted of felonies.[93] Rather, "convictions for drug offenses are the

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88 ROY WALMSLEY, WORLD PRISON BRIEF, WORLD PRISON POPULATION LIST 2 (2016).

89 *See id*. at 2, 5 & tbl.2 (showing that the global prison population is approximately 10.35 million and that the U.S. prison population is 2,217,500).

90 MICHELLE ALEXANDER, THE NEW JIM CROW 60 (2010).

91 E. ANN CARSON, BUREAU OF JUSTICE STATS., PRISONERS IN 2014 at 15 (2015).

92 GOTTSCHALK, *supra* note 2, at 2 ("The carceral state . . . has been cleaving off wide swaths of people in the United States from the promise of the American Dream or 'American Creed'—the faith that everyone has an inalienable right to freedom, justice, and equal opportunities to get ahead, and that everyone stands equal before the law."); *see generally* ALEXANDER, *supra* note 90.

93 ALEXANDER, *supra* note 90, at 101–02 (explaining that "violent crime rates have fluctuated over the years and bear little relationship to incarceration rates—which have soared during the past three decades regardless of whether violent crime was going up or down"). Almost one out of every three people in the United States serving prison time for a drug offense is held in the federal prison system. Ryan King et al., *How to Reduce the Federal Prison Population*, URBAN INST., http://webapp.urban.org/reducing-federal-mass-incarceration/.

single most important cause of the explosion in incarceration rates."[94] This is especially true in federal prisons, where half of males (50%) and more than half of females (59%) are serving time for drug offenses.[95]

Moreover, while the majority of illegal drug users and dealers are white, three-fourths of individuals serving time for drug offenses are black or Latino.[96] This disparity cannot be explained by the rates of drug crime among different racial groups.[97]

The Cost of the Federal Prison System

The Department of Justice itself has noted that addressing the enormous cost pressures created by the mass incarceration phenomenon described above should be one of the government's most pressing priorities.[98] In fiscal year 2000, the budget for the federal Bureau of Prisons (BOP) totaled approximately $3.8 billion, accounting for 18% of the Department of Justice's discretionary budget.[99] In fiscal year 2014, in comparison, the BOP's budget reached $6.9 billion, accounting for 25% of the Department of

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94 ALEXANDER, *supra* note 90, at 60.

95 CARSON, *supra* note 91, at 1.

96 ALEXANDER, *supra* note 90, at 98.

97 *Id*. at 99 (summarizing data showing that whites comprise the vast majority of drug users, despite the fact that blacks are incarcerated at significantly higher rates).

98 *See* Memorandum from Michael E. Horowitz, Inspector General, to Att'y Gen. and Deputy Att'y Gen. on Top Management and Performance Challenges Facing the Department of Justice (Nov. 10, 2014), https://oig.justice.gov/challenges/2014.htm [hereinafter Horowtiz Memorandum].

99 *Id*.

Justice's discretionary budget.[100] That growth rate was nearly twice the rate of budget growth in the rest of the Department of Justice.[101] These ballooning costs are expected to continue largely unabated: the Department's fiscal year 2015 budget request for the Bureau of Prisons reflects a 0.5% increase from the funding it received in fiscal year 2014.[102]

The enormous cost of maintaining the federal prison system in its current, bloated form has a direct impact on the Department of Justice's ability to pursue its other priorities.[103] The Department's own inspector general noted in 2014 that the continued growth in the cost of operating and maintaining the federal prison system "result[s] in less funding being available for the Department's other critical law enforcement missions" and that "federal prison spending continues to impact the Department's ability to make other public safety investments."[104]

As a result, the Department has highlighted the need to "better utilize programs that can assist in prison population management, particularly existing programs and policies that Congress has already authorized."[105] As statisticians have noted, reducing

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100 *Id*.
101 *Id*.
102 *Id*.
103 NANCY LA VIGNE & JULIE SAMUELS, URBAN INST., THE GROWTH & INCREASING COST OF THE FEDERAL PRISON SYSTEM: DRIVERS AND POTENTIAL SOLUTIONS 2 (2012).
104 Horowitz Memorandum, *supra* note 98.
105 Horowitz Memorandum, *supra* note 98.

the number of drug offenders committed to federal prison would "reduce the long-term projections and cost for the system."[106]

The Collateral Consequences of Criminal Convictions

Mass incarceration, its racial contours, and its associated costs are all the more concerning when viewed alongside the development of the "eternal criminal record." Given the broad swath of collateral consequences associated with conviction, the explosion of incarceration in America has a direct impact on millions more lives than one might initially imagine.[107] Most ex-felons are subjected to various forms of what scholars have termed "civil death": they face discrimination in housing and employment, as well as lifetime bans on voting, certain types of professional employment, and jury service.[108] Those effects, though significant, barely scrape the surface of what confronts convicted offenders: recent data suggests there are over 44,000 collateral consequences of criminal conviction.[109]

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106 LA VIGNE & SAMUELS, *supra* note 103, at 6; U.S. GOV'T ACCOUNTABILITY OFF., BUREAU OF PRISONS: INFORMATION ON EFFORTS AND POTENTIAL OPTIONS TO SAVE COSTS 48 (2014).

107 GOTTSCHALK, *supra* 2, at 1.

108 *Id*. at 242.

109 *National Inventory of Collateral Consequences of Conviction (NICCC)*, AM. BAR ASS'N, http://www.americanbar.org/content/dam/aba/events/criminal_justice/annual14_Barriers_Reentry.authcheckdam.pdf.

Approximately twenty million Americans have felony convictions; it follows, then, that at least as many have criminal records.[110] Those records, though originally intended to facilitate the efficient operation of the criminal justice system, today function as the one of the most serious consequences of being arrested or convicted.[111] Criminal records last forever, and the combination of mass incarceration and the "eternal criminal record" has, especially in recent years, led to the "branding" of people with criminal records as second-class citizens.[112] Such stratification removes from prior offenders "many of the things associated with forging healthy identities and desisting from crime over the long run," thereby creating "condemnation scripts" that make it exponentially harder for former offenders to establish the employment, relationships, and communities necessary to avoid recidivism.[113] As Michelle Alexander wrote in *The New Crow*, "As a criminal, you have scarcely more rights, and arguably less respect, than a black man living in Alabama at the height of Jim Crow. We have not ended racial cast in America; we have merely redesigned it."[114]

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110 JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD 1 (2015).
111 *Id*. at 1, 4.
112 *See* GOTTSCHALK, *supra* note 2, at 256 (describing the exclusion and stigmatization of those with felony convictions in the "prison beyond the prison").
113 *Id*. at 256–57.
114 ALEXANDER, *supra* note 90, at 2.

CHAPTER 4: A PROPOSAL TO EXPAND THE USE OF DPAS

Given Congress's intent in authorizing the use of deferred prosecution agreements by federal prosecutors, the existence of Department of Justice Standards to guide prosecutors in realizing Congress's intent, and the need for criminal justice reform identified in the previous chapter, expanding the use of deferred prosecution agreements to cases involving noncorporate criminal defendants may be advisable. This chapter evaluates the advantages and disadvantages of that proposition.

Advantages of Expanding the Federal Government's Use of DPAs

As discussed above, deferred prosecution agreements were originally used to resolve prosecution against juvenile offenders or individuals facing charges for nonviolent offenses.[115] That use aligned with the intent of prosecutors, who used such agreements "as a way to impede future criminal conduct without saddling defendants with the scarlet mark of a criminal charge."[116]

By limiting the use of DPAs to cases involving nonviolent offenses, including first-time drug possession charges and certain types of theft, federal prosecutors would be able to reap the utilitarian rewards of avoiding prosecution while achieving some measure

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115 *See infra* ch. 1; *see also* Joan McPhee, *Deferred Prosecution Agreements: Ray of Hope or Guilty Plea by Another Name?*, CHAMPION, Oct. 2006, at 12, 13; Candance Zierdt & Ellen S. Podgor, *Corporate Deferred Prosecutions Through the Looking Glass of Contract Policing*, 96 KY. L.J. 1, 4 (2008).

116 Kristie Xian, Note, *The Price of Justice: Deferred Prosecution Agreements in the Context of Iranian Sanctions,* 28 NOTRE DAME J. L., ETHICS & PUB. POL'Y 631, 642 (2014).

of the rehabilitative and deterrent benefits engrained within the criminal justice system.[117] Specifically, DPAs provide offenders an opportunity to "pay" for their crimes and reenter society absent the collateral consequences of felony convictions discussed above.[118] Because they guarantee prosecution if the terms of the agreement are breached, DPAs achieve many of the deterrent benefits associated with criminal convictions and sentencing.[119] And because they avoid criminal trials and sentencing hearings, DPAs decrease the burden on prosecutors and judges.[120]

The use of DPAs for noncorporate defendants can thus be considered a utilitarian approach to the problems discussed earlier in this chapter.[121] In the noncorporate context, DPAs are available for less serious criminal charges in which "the societal benefits of prosecution"—achieving maximum deterrent effect and highlighting retribution as a primary motivator of punishment—"may be outweighed by the costs to the defendant."[122] Using DPAs for nonviolent, nonrecidivist offenders would "reserve[] criminal prosecution for more serious crimes and defendants who are repeat violators."[123] Cutting admission to federal prison for drug trafficking offenses would reduce the federal prison

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117 *Id*. at 643 (explaining that "utilizing deferred prosecution agreements in their original capacity" allows prosecutors to facilitate the offender's rehabilitation and reintegration, avoid the collateral consequences of criminal charges and convictions, deter future participation in criminal conduct, and reduce docket congestion in the criminal justice system).

118 Xian, *supra* note 116, at 643; *see supra* pp. 25–26.

119 Xian, *supra* note 116, at 643.

120 *Id*. at 644.

121 *See* Uhlmann, *supra* note 59, at 1305 (2013) (characterizing the theoretical basis for pretrial diversion as utilitarian).

122 *Id*.

123 *Id*.

population significantly, and doing so through the use of DPAs—given the Department of Justice's existing restrictions on the classes of offenses and offenders who are eligible for such agreements— would not require leaving so-called "dangerous" offenders on the streets.[124] As of 2012, more than a third (35%) of drug offenders in federal prison had either no or minimal criminal history at the time they were sentenced.[125]

More fundamentally, expanding the actual use of DPAs to the extent allowed by existing Department of Justice standards would be in keeping with the Department's stated support for "programs that provide alternatives to incarceration, coupled with treatment and supervision, in an attempt to reduce recidivism."[126] Such a policy change would contribute to the federal government's stated goal of reducing excessive incarceration, especially in the drug context, but would not require dramatic regulatory or legislative changes.

Disadvantages of Expanding the Federal Government's Use of DPAs

As demonstrated in the context of white collar crime, deferred prosecution agreements are not free from criticism. This section examines two of the most prominent criticisms lobbed at these types of agreements: the dangers of unchecked prosecutorial discretion and the impact of DPAs on the rule of law.

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124 King, *supra* note 93.

125 SAM TAXY ET AL., U.S. DEP'T OF JUSTICE, DRUG OFFENDERS IN FEDERAL PRISON: ESTIMATES OF CHARACTERISTICS BASED ON LINKED DATA 4 (2014).

126 Horowitz Memorandum, *supra* note 98.

PROSECUTORIAL DISCRETION

Critics of DPAs have argued that such agreements enhance preexisting problems associated with prosecutorial discretion.[127] This is true, critics allege, because the use of DPAs allows prosecutors to resolve criminal matters before an alleged offender is even indicted.[128] As such, the negotiation of DPAs takes place outside of "all but the most minimal judicial and public oversight," and prosecutors may be able to exploit their considerable leverage to coerce offenders into accepting agreements even when the government would not otherwise be able to secure a conviction.[129]

The perils of unbridled prosecutorial discretion, particularly in the context of drug offenses, are impossible to ignore.[130] But while it is true that prosecutors and judges have "tended to use their discretion . . . to lean in a more punitive direction," the wide latitude they enjoy also gives them the ability to "shift now and embrace alternatives to incarceration.[131] Prosecutors, as "individuals serving on the front lines of the criminal justice system," have the unique ability to "choose a less punitive path" without necessitating comprehensive sentencing reform requiring statutory changes.[132] Federal prosecutors, merely by using the standards already promulgated by the Department of Justice with respect to deferred prosecution agreements, could play a key role in lowering

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127 Bourjaily, *supra* note 82, at 543.
128 *Id*.
129 *Id*.
130 *See generally* DAVIS, *supra* note 3.
131 GOTTSCHALK, *supra* note 2, at 264.
132 *Id*.

incarceration rates and, given the disparities detailed in the previous chapter, reducing racial stratification.[133]

THE RULE OF LAW

Critics of DPAs also allege that the use of such agreements undermines public faith in the rule of law.[134] In the context of corporate criminal liability, this argument relies on the public's perception of corporate DPAs as "sweetheart deals" given only to companies that are considered "too big to jail."[135] The result, scholars have explained, is that "the law ceases to communicate social values."[136]

This argument is less persuasive, however, in the context of nonviolent criminal offenses by nonrecidivist offenders. In those situations, leaders throughout the federal government have called for new approaches to prosecution and sentencing.[137] Those leaders have found broad support in the general public,[138] and that support exists in both liberal and conservative camps.[139]

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133 *Id*. at 267; *see supra* pp. 23–26.

134 Bourjaily, *supra* note 82, at 543. *See, e.g*., Janet Novack, FORBES, "Club Fed, Deferred" (Aug. 24, 2005 8:40 AM), http://www.forbes.com/2005/08/24/kpmg-taxes-deferred-cz_jn_0824beltway.html (listing KPMG, American International Group, Monsanto, Computer Associates International Bristol-Myers Squibb, Time Warner, Merrill Lynch, Royal Dutch Petroleum, PNC Financial Services Group, and AmSouth Bancorp as the beneficiaries of deferred prosecution and noting that many have called such agreements "too soft on corporations").

135 Bourjaily, *supra* note 82, at 544.

136 *Id*. at 544.

137 *See supra* p. 21.

138 *See* Kevin Ring, "Is Congress Too Broken To Pass Criminal Justice Reform?" (Dec. 22, 2015 12:15 PM), DAILY CALLER, http://dailycaller.com/2015/12/22/is-congress-too-

CONCLUSION

> *[P]eople are no less prone to rehabilitation than corporations. Drug conspiracy defendants are no less deserving of a second-chance than bribery conspiracy defendants. And society is harmed at least as much by the devastating effect that felony convictions have on the lives of its citizens as it is by the effect of criminal convictions on corporations.*[140]

The federal government's reluctance to use deferred prosecution agreements—a pre-existing tool already structurally authorized by both Congress and the Department of Justice—to "provide the same opportunity to individual defendants to demonstrate their rehabilitation without triggering the devastating collateral consequences of a criminal conviction" is, to say the least, troubling.[141]

Congress's intent in authorizing the federal use of DPAs was clear: In keeping with the history of DPAs as a means to resolve criminal offenses without unnecessarily "branding" certain categories of offenders, legislators modeled the agreements on programs that provided pretrial intervention alternatives for first-time, nonviolent defendants. The Department of Justice's existing guidelines for the use of DPAs provide no limitation on prosecutors' ability to use these tools for noncorporate criminal

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broken-to-pass-criminal-justice-reform/ (citing a poll in which 77% of respondents said they favored repealing mandatory minimum prison sentences for nonviolent drug offenders).

139 *See* Nick Pinto, "Why Can't We End Mass Incarceration?," NEWSWEEK (Nov. 8, 2015 6:11 PM), http://www.newsweek.com/why-cant-we-end-mass-incarceration-391881 (describing the "sea change" in popular enthusiasm for mass incarceration and noting that a "bipartisan consensus" has coalesced around the need for reform).

140 United States v. Saena Tech Corp., 2015 WL 6406266, at *29 (D.D.C. Oct. 21, 2015).

141 *Id*. at *25.

defendants, despite the Department's historical insistence on reserving them for resolving charges against our nation's largest companies. As courts have begun to note, "increasing the use of deferred-prosecution agreements and other similar tools for individuals charged with certain non-violent criminal offenses could be a viable means to achieve reforms in our criminal justice system."[142] As such, both U.S. Attorneys and the broader Department of Justice should re-evaluate the use of these important tools in cases involving noncorporate criminal defendants.

142 *Id*. at *21.

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